

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ITOFFEE R. GAYLE

Plaintiff,

1:18-cv- 03774 (RA)

AMENDED COMPLAINT

-v.-

DAVID S. ALLEE et al. ,

Defendants.

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I, the Pro Se Plaintiff, Itoffee R. Gayle move to cure the deficiencies in the original complaint Judge Abrams has identified during the Telephone Conference on 04/10/20.

The Defendant(s), David Allee, photographed, showcased, and presented for sale the "Photo" at his solo exhibition "Chasing Firefly" at the Morgan Lehman Gallery in 2017. The subject matter **and** title of the Photo includes the intellectual property that the Plaintiff filed with the U.S Patent and Trademark Office and the U.S. Copyright Office. This includes Registration Numbers: VA-2-006-958, VA 2-088-822, 5-108-721, and 5-895-417. Itoffee R Gayle, Pro Se Plaintiff, created the graffiti art "ART WE ALL ONE" which includes the Mark "ART WE ALL" that the Defendant photographed on the construction barrier in the Photo. Not only is the Plaintiff's copyrighted artwork the **subject** of the Photo, the Defendant uses the Plaintiff's Mark as the **title** of the Photo. This causes great confusion because the Defendants, David Allee and Morgan Lehman Gallery are associated as the sources in connection with the title of the Photo. This completely removes the Pro Se Plaintiff, Itoffee R Gayle, as the creator and source of the Defendant's Photo or affiliation with the Photo in any way. This misleads anyone who has viewed the Photo in person or on the internet as to the source of content of the Photo. The Defendant David Allee's use of the mark "ART WE ALL" in the body and title of the Photo infringes on Plaintiff's trademark rather than service mark usage. The Defendant Morgan Lehman Gallery's use of the service mark is in connection with being the retail provider for the Photo. The Court should consider that the Pro Se Plaintiff is an artist that offers for sale works of art and goods containing the Plaintiff's protected phrase -"ART WE ALL" - in the art market as a whole as well as the subset markets of professional photography and street photography - in person and online. Morgan Lehman Gallery providing

exhibition services for the Photo misleads anyone who has viewed the Photo in person or on the internet as the source or official retailer for the Plaintiff's artwork. The Plaintiff has not authorized Morgan Lehman Gallery to be an advertiser or retail provider of art or goods bearing the phrase "ART WE ALL" - and in doing so infringes the Plaintiff's service mark "ART WE ALL" registered under Class 35 – Retail Services featuring works of art, NY state business law(s), and is likely to cause confusion as to the origin of the art or who the art is affiliated with.

The Pro Se Plaintiff is the author, exclusive licensee, and owner of the registrations for the copyrightable works associated with "ART WE ALL"/"ARTWEALL" and its variations. "ART WE ALL"/"ARTWEALL" is protected in the artistic graffiti style depiction of the images constituting the material submitted to the U.S. copyright office. **The Plaintiff's copyright is for visual material *not* a short phrase and is therefore copyrightable visual art. It is this artistic design that comprises the copyrighted material, not the words by themselves** - characterizing the work submitted to the U.S. copyright office as copyrightable visual art and photography entitled to protection. Therefore, Itoffee R. Gayle, owns the copyrights in these works which have been registered in accordance with the proper statute(s) and as a Pro Se Plaintiff, has fulfilled valid federal copyright infringement, trademark infringement under the Lanham act and state law claims as well as unfair competition.

To further clarify that the Pro Se Plaintiff has sufficiently set forth in proving that the Defendant's copying is more than de minimis and a valid cause of action for confusion – see below the following pleadings:

- a. *the similarity of the Mark*: the Defendant did not just use a similar mark, they used the actual mark in their Photo
- b. *the closeness of the products*: both are artistic expressions, both are graffiti – like and depict a particular urban mood and atmosphere
- c. *defendant's motive and good faith*: it is clearly apparent that the Defendant intended to use the Plaintiff's mark in their Photo. The Plaintiff registered the mark and copyrighted the design under a very similar name **before** the Defendant's copying

*In addition, included in this amended complaint are a number of exhibits that support and further substantiate the Pro Se Plaintiff's claims

It is respectfully submitted that the Pro Se Plaintiff, Itoffee R Gayle, requires an appropriate monetary amount of \$350,000.00 to compensate for the unauthorized use and damages caused as a result of unfair competition, trademark infringement under the Lanham Act and state law as well as copyright infringement under federal law in this matter.

Dated: July 14, 2020

/s/ Itoffee R Gayle

Itoffee R. Gayle, Pro Se Plaintiff
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Via Email Sent To:

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- lgoldbard@stroock.com
- bnshah@stroock.com

***EXHIBITS**

- A. An image of a fan questioning the Plaintiff's awareness of the Photo in the David Allee - Morgan Lehman Gallery exhibition



- B. An image of a fan commenting on the Photo crediting the Defendants only since there is no link or source tracing to the Plaintiff whatsoever in the promotion of the Photo



- C. Image of the Morgan Lehman Gallery advertising and promoting the Photo on their website homepage



- D. Image of the Photo advertised online as a copyright of David Allee, courtesy of Morgan Lehman Gallery which includes Plaintiff's protected artwork in the subject and mark as the title.



2 days ago

Feature Shoot

Uncanny Photos Taken in the Dead of Night - Feature Shoot

Art We All One, 2016 © David Allee, courtesy Morgan Lehman Gallery

Images may be subject to copyright.

[Visit page](#) [Share](#)

- E. The specific images submitted to the handling attorney of Direct Incorporation (DirectIncorporation.com) of which is covered by the copyright VA 2-006-958. A certified copy of this copyright is available by mail request to the Copyright office + associated fees.



ART WE
ALL ONE

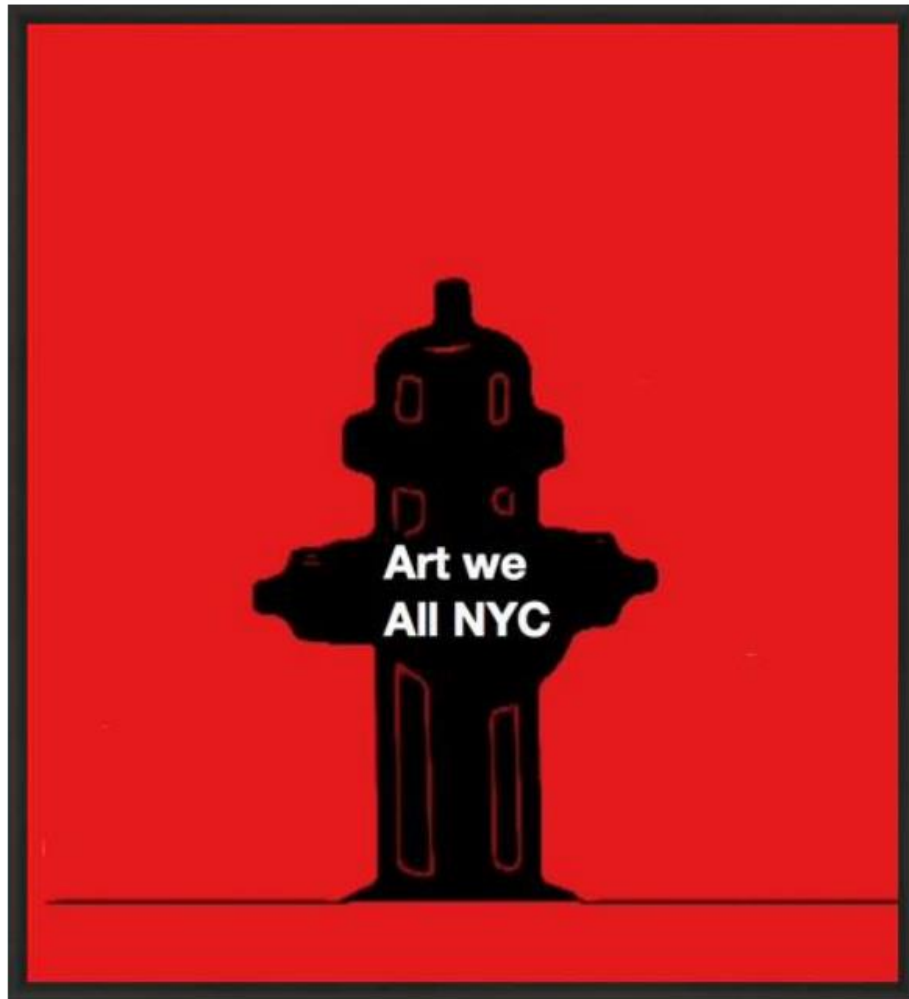
ART WE ALL

ART+WE
All ONE
NYC



Artwe

Allone



F. The specific images covered by the copyright VA 2-088-822

ART WE ALL NYC



Art we All NYC LLC – Copyright Registration (2D VA) 2017

ART WE ALL NYC



ART WE ALL NYC



ART WE ALL NYC



ART WE ALL NYC



Art we All NYC LLC – Copyright Registration (2D VA) 2017

ART WE ALL NYC



ART WE ALL NYC



ART WE ALL NYC



ART WE ALL NYC



ART WE ALL NYC

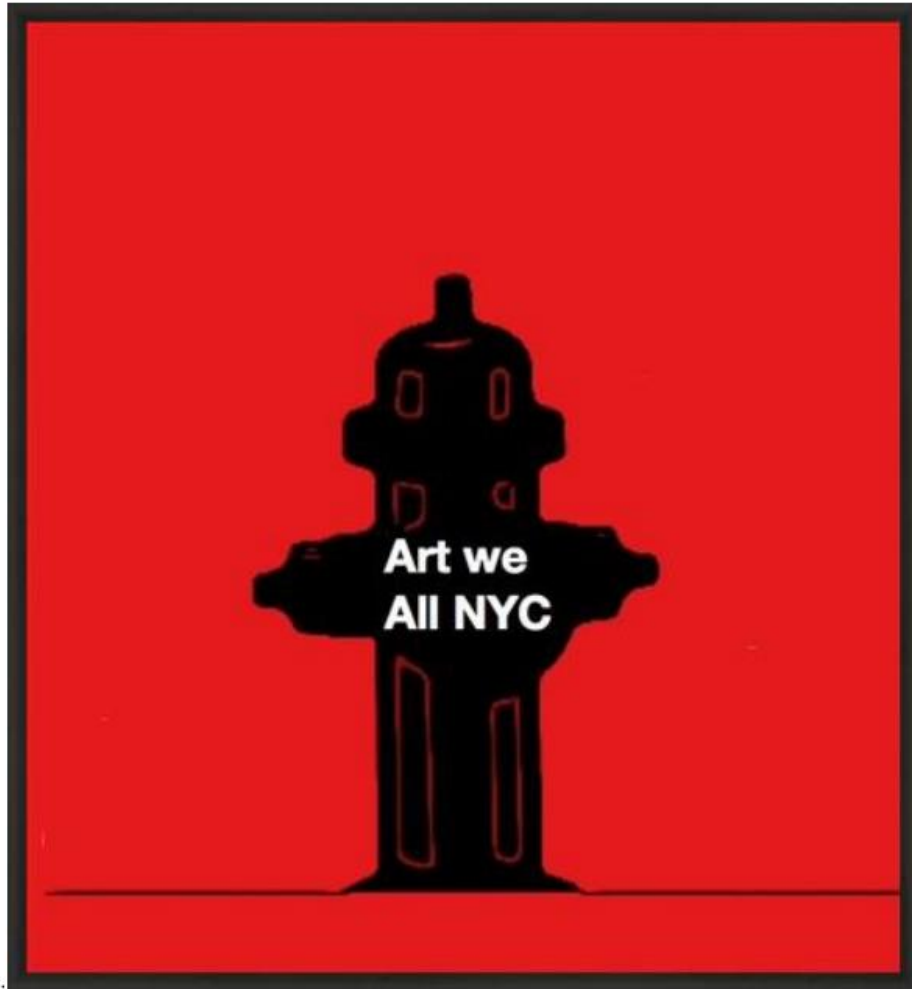


ART WE ALL NYC



Art we All NYC LLC – Copyright Registration (2D VA) 2017

ART WE ALL NYC



G. Copyright VA 2-006-958

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Maria A. Pallante

United States Register of Copyrights and Director

Registration Number

VA 2-006-958

Effective Date of Registration:

March 25, 2016

Title

Title of Work: Art We All

Completion/Publication

Year of Completion: 2012
Date of 1st Publication: January 01, 2012
Nation of 1st Publication: United States

Author

• Author: Itoffee Gayle
Author Created: photograph
Citizen of: United States

Copyright Claimant

Copyright Claimant: Itoffee Gayle
2010 Powell Ave., Bronx, NY, 10472, United States

Rights and Permissions

Name: Itoffee Gayle
Email: representart1@gmail.com
Telephone: (917)952-5661

Certification

Name: Itoffee Gayle
Date: March 25, 2016

H. Copyright VA 2-088-822

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Karen Leigh Clayton

Acting United States Register of Copyrights and Director

Registration Number

VA 2-088-822

Effective Date of Registration:

March 28, 2017

Title

Title of Work: Art we All Group Registration Photos, New York, published January 1, 2012; 13 photos.

Completion/Publication

Year of Completion: 2012
Date of 1st Publication: January 01, 2012
Nation of 1st Publication: United States

Author

• **Author:** Itoffee Gayle
Author Created: 2-D artwork
Citizen of: United States
Domiciled in: United States

Copyright Claimant

Copyright Claimant: Itoffee Gayle
2010 Powell Ave, Bronx, NY, United States

Rights and Permissions

Name: Itoffee Gayle
Email: itoffeegayle@yahoo.com
Telephone: (917)952-5661
Alt. Telephone: (347)624-2475

Certification

Name: Itoffee Gayle
Date: February 06, 2018

I. Trademark 5 -108-721

United States of America

United States Patent and Trademark Office

ART WE ALL

Reg. No. 5,108,721

Registered Dec. 27, 2016

Int. Cl.: 35

Service Mark

Principal Register

Gayle, Itoffee (UNITED STATES INDIVIDUAL)
2010 Powell Ave Apt 2F
Bronx, NY 10472

CLASS 35: Retail store services featuring works of art

FIRST USE 4-27-2016; IN COMMERCE 4-27-2016

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY
PARTICULAR FONT STYLE, SIZE OR COLOR

SER. NO. 87-032,634, FILED 05-11-2016
STEPHANIE DIA RYDLAND, EXAMINING ATTORNEY



Michelle K. Lee

Director of the United States
Patent and Trademark Office
